

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
KENSINGTON GATE OWNERS	:	DETERMINATION
INCORPORATED	:	DTA NOS. 817445,
	:	817446, 817447,
for Revision of a Determination or for Refund of Sales and	:	817448, 817449,
Use Taxes under Articles 28 and 29 of the Tax Law for the	:	817450 and 817451
Period September 1, 1992 through December 31, 1994.	:	

In the Matter of the Petition	:
of	:
SUNRISE POINT EAST CONDOMINIUM	:
for Revision of a Determination or for Refund of Sales and	:
Use Taxes under Articles 28 and 29 of the Tax Law for the	:
Period October 1, 1992 through December 31, 1994.	:

In the Matter of the Petition	:
of	:
TOPPER REALTY CORP.	:
for Revision of a Determination or for Refund of Sales and	:
Use Taxes under Articles 28 and 29 of the Tax Law for the	:
Period December 1, 1992 through December 1, 1994.	:

In the Matter of the Petition :

of :

WESTBURY TERRACE CONDOMINIUM :

for Revision of a Determination or for Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period October 1, 1992 through December 31, 1994. :

In the Matter of the Petition :

of :

WHITE OAKS NURSING HOME f/k/a :
WOODBURY HEALTH RELATED FACILITY :

for Revision of a Determination or for Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period August 1, 1993 through December 30, 1995. :

In the Matter of the Petition :

of :

WILLOW HOUSE OWNERS CORP. :

for Revision of a Determination or for Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period December 1, 1992 through November 30, 1995. :

In the Matter of the Petition	:
of	:
30 GRACE AVENUE APARTMENTS CORP.	:
for Revision of a Determination or for Refund of Sales and	:
Use Taxes under Articles 28 and 29 of the Tax Law for the	:
Period December 1, 1992 through December 1, 1994.	:

Petitioner, Kensington Gate Owners Incorporated, c/o Einsidler Mgt., 535 Broadhollow Road, Melville, New York 11747, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1992 through December 31, 1994.

Petitioner, Sunrise Point East Condominium, c/o M. Topper, 84 East Park Avenue, Long Beach, New York 11561, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period October 1, 1992 through December 31, 1994.

Petitioner, Topper Realty Corp., 84 East Park Avenue, Long Beach, New York 11561, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1992 through December 1, 1994.

Petitioner, Westbury Terrace Condominium, 135 Post Avenue, Westbury, New York 11590, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period October 1, 1992 through December 31, 1994.

Petitioner, White Oaks Nursing Home f/k/a Woodbury Health Related Facility, 8565 Jericho Turnpike, Woodbury, New York 11797, filed a petition for revision of a determination or

for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period August 1, 1993 through December 30, 1995.

Petitioner, Willow House Owners Corp., c/o Einsidler Mgt., 535 Broadhollow Road, Melville, New York 11747, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1992 through November 30, 1995.

Petitioner, 30 Grace Avenue Apartments Corp., c/o Einsidler Mgt., 535 Broadhollow Road, Melville, New York 11747, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1992 through December 1, 1994.

A hearing was held before Catherine M. Bennett, Administrative Law Judge, at the offices of the Division of Tax Appeals, State Office Building, Veterans Memorial Highway, Hauppauge, New York, on July 26, 2000, at 11:00 A.M., with all briefs to be submitted by February 28, 2001, which date began the six-month period for the issuance of this determination. Petitioners appeared by Robert A. Wagner, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Cynthia E. McDonough, Esq., of counsel).

ISSUE

Whether the Division of Taxation properly determined that refunds issued to petitioners for sales tax paid on gas and utility purchases made by them from LILCO were erroneously paid.

FINDINGS OF FACT

1. Petitioners, Kensington Gate Owners, Inc. ("Kensington"), Sunrise Point East Condominium ("Sunrise"), Topper Realty Corp. ("Topper"), Westbury Terrace Condominium ("Westbury"), White Oaks Nursing Home f/k/a Woodbury Health Related Facility

(“Woodbury”), Willow House Owners Corp. (“Willow”), and 30 Grace Avenue Apartments Corp. (“Grace”), filed refund claims for the respective periods in issue for sales and use taxes paid to Long Island Lighting Company (“LILCO”) for the purchase of energy products used for residential purposes. The refund claims were reviewed along with petitioners’ backup documentation, consisting of handwritten worksheets prepared by a company known as Utility Bill Analysis (“UBA”), computer sheets stamped with “LILCO,” and a summary statement of bills rendered by LILCO, and the refunds were thereafter granted to petitioners. The Division of Taxation (“Division”) now contends petitioners were not properly entitled to such funds.

2. The Division has, in prior years, relied upon the accuracy of, and accepted, LILCO computerized billing summaries which were submitted in support of petitioners’ claims for refund.

3. Subsequent to the payment of petitioners’ refund claims, the Division discovered discrepancies in similar utility tax refund claims between the summary sheets submitted by UBA and the actual amount of sales taxes billed by LILCO in its invoices to its other customers. The Division’s auditors compared actual LILCO invoices for the other refund claims and found that the invoices: (i) did not show any sales taxes charged, or (ii) showed only a reduced sales tax amount charged to reflect only the reduced local sales tax rate, or (iii) showed a tax amount charged at a rate which included local school taxes not subject to refund. Having discovered such discrepancies, the Division requested petitioners to provide actual LILCO invoices and canceled checks for selected months of the refund periods in issue or, in the alternative, a statement from LILCO (now Long Island Power Authority or LIPA) indicating the actual amount of tax billed to each petitioner for the refund periods in question, in order to verify the actual amount of sales taxes paid. Petitioners either did not provide the requested documentation or

provided documentation which did not satisfy the Division's request, and the Division concluded that all the refunds were paid in error. The assessments issued in this matter reflect the Division's conclusion that the refunds were erroneous.

4. Petitioners are all residential customers for the purpose of the purchase of utilities, and the LILCO utilities purchased were for residential use.

5. The Division issued a notice of determination to Kensington dated July 13, 1998, asserting additional sales and use taxes for the period ended November 13, 1995 in the amount of \$12,428.35 (the amount of the refund paid), plus penalty and interest, for a total amount due of \$20,835.45.

The Division issued a notice of determination to Sunrise dated March 20, 1998, asserting additional sales and use taxes for the period ended December 11, 1995 in the amount of \$8,223.11 (the amount of the refund paid), plus penalty and interest, for a total amount due of \$13,265.88.

The Division issued a notice of determination to Topper dated March 20, 1998, asserting additional sales and use taxes for the period ended January 22, 1996 in the amount of \$5,256.88 (the amount of the refund paid), plus penalty and interest, for a total amount due of \$8,385.80.

The Division issued two notices of determination to Westbury dated May 11, 1998, asserting additional sales and use taxes for the periods ended December 11, 1995 and December 12, 1995 in the amounts of \$5,654.30 (the amount of the refund paid), plus penalty and interest, for a total amount due of \$9,249.73, and \$981.53 (the amount of the refund paid) plus penalty and interest, for a total amount of \$1,605.13, respectively.

The Division issued two notices of determination to White Oaks Nursing Home (f/k/a Woodbury) dated May 22, 1998, asserting additional sales and use taxes for the period ended

November 13, 1996 in the amount of \$31,954.50 (the amount of the refund paid) plus penalty and interest, for a total amount due of \$47,296.94, and \$12,758.54 (the amount of the refund paid) plus penalty and interest, for a total amount due of \$18,884.28, respectively.

The Division issued a notice of determination to Willow dated June 8, 1998, asserting additional sales and use taxes for the period ended January 24, 1996 in the amount of \$12,736.53 (the amount of the refund paid), plus penalty and interest, for a total amount due of \$20,745.18.

The Division issued a notice of determination to Grace dated July 13, 1998, asserting additional sales and use taxes for the period ended January 24, 1996 in the amount of \$13,927.21 (the amount of the refund paid), plus penalty and interest, for a total amount due of \$22,899.87.

6. The seven petitioners appeared before the Bureau of Conciliation and Mediation Services on May 13, 1999 in protest of the above-referenced notices, each of which was sustained by Conciliation Orders (CMS Nos. 169607, 167836, 167826, 168343, 168528, 169078, and 169608) dated October 22, 1999.

7. Petitioners commenced a proceeding in the Division of Tax Appeals by the filing of seven petitions in a timely manner on December 8, 1999. Their representative Robert A. Wagner, Esq. submitted the seven petitions in the same mailing. Each of the petitions bore assertions of identical error by the Division and were differentiated only by the amount of asserted tax and the assessed tax period in some instances. The petitions alleged that petitioners paid sales and use tax to LILCO for the periods indicated, though petitioners were exempt from such tax. The petitions assert that LILCO acknowledges in its computer account ledger statements that tax was improperly included in its calculation concerning petitioners' accounts.

8. The Division filed answers to each of the seven petitions dated February 10, 2000, denying knowledge or information sufficient to form a belief as to the factual allegations in the

petition and affirmatively setting forth the basis of the Division's assessment, that petitioners did not submit invoices which substantiated the refund claims.

9. In the case of Kensington, Willow and Grace, petitioners did not provide any additional documentation, i.e. LILCO invoices, to support the refund claim. The computer billing summaries for each show tax computed at the rate of 8 ½%.

In the case of Woodbury and Westbury, the LILCO invoices provided by petitioners indicated that no sales tax was billed to them. However, the computer billing summaries show tax computed at the rate of 8 ½%. When petitioners' representative raised the discrepancy with LIPA (LILCO's successor), he received the following June 1, 1999 response concerning Westbury:

The above mentioned account [of Westbury] is tax exempt. The gas statement you refer to erroneously shows tax amounts subsequent to that date.

Please be assured that both the gas and electric services have been tax exempt since May 1992. The total (dollars + tax) is correct; the computer simply backed the taxes out of the total amount.

As to Sunrise and Topper, petitioners provided several invoices which show that sales tax at the rate of 3% was charged, representing only the local school district sales tax rate for which no statutory exemption or reduced rate exists. The computer billing summaries show tax computed at the rate of 11 ½%.

10. Another LILCO document submitted by petitioner Willow, entitled Statement of Bills Rendered, showed tax computed at the rate of 8 ½%. This document bore similar information to the computer billing summaries: gas date, days (in the cycle), consumption figure, therm factor, therms (used after application of the factor), dollars and tax. Entries on the Statement of Bills

Rendered correspond to entries for the same time periods on the related computer billing summary.

11. The total dollars amount, kilowatt hours and therm usage as shown on the LILCO computer billing summaries match the LILCO monthly invoices and the one Statement of Bills Rendered that were presented as part of the record. The only item in which there is a discrepancy between the LILCO computer billing summaries and the LILCO monthly invoices is the indication of sales tax included as part of the charges, or stated in an amount representing a different rate.

12. Introduced by the Division as part of the record was a memo from Audit Team Leader Marsha Eisner, who testified at the hearing, to other Division employees, including her District Audit Manager, describing a meeting on April 7, 1997, with Roger Ehrler, Director of Corporate Taxes for LILCO. At that meeting the Division discovered that the discrepancy between the LILCO invoices and LILCO's computer printouts occurred due to a computer programming error which used the invoice amount to back into the taxable and tax amounts. The computer printouts were determined to be incorrect.

SUMMARY OF THE PARTIES' POSITIONS

13. Petitioners maintain they have met their burden of proving that sales tax was paid on the utilities they purchased from LILCO, and accordingly, they should be permitted to retain the refunds of such tax as acquired by them from the Division.

14. The Division argues that petitioners have not met their burden of proof to show they actually paid State and local sales tax on their purchases of residential utility services from LILCO. The Division asserts its right to recover sales tax refunds erroneously paid.

CONCLUSIONS OF LAW

A. Pursuant to Tax Law § 1105-A, the retail sale of gas and electrical utilities to residential customers, among other forms of energy, used for residential purposes is subject to a reduced New York State sales tax rate. A corresponding optional reduced rate of local sales tax (except for New York City) is set forth at Tax Law § 1210(a)(3). Local school districts may opt to impose an additional 3% sales tax on the same utility services pursuant to Tax Law § 1212(a), which is in addition to the local tax at a reduced rate imposed pursuant to Tax Law § 1210(a)(3).

There is no dispute that petitioners were residential customers, and the LILCO utilities were purchased for residential use. The question becomes one of substantiation, i.e., whether petitioners met their burden of proving that sales tax was included in amounts paid to LILCO for utility usage where the sales tax was not, in whole or in part, reflected on petitioners' invoices.

B. Tax Law § 1139 and 20 NYCRR 534.8 provide for a refund of sales tax when such taxes have been erroneously, illegally or unconstitutionally paid or collected. In making such application, taxpayers are required to present a full explanation of facts on which the claim is based, including substantiation of the basis for and the amount of the claim (20 NYCRR 534.2[a][2][g]). Such substantiation must clearly be reliable. When petitioners first presented their refund claims substantiated by the LILCO computer billing summaries showing tax in excess of the correct rate charged, the Division accepted the claims as substantiated. UBA was merely attempting to correct what appeared to be an overpayment by its client, and had been provided with the computer billing summaries directly from LILCO for its review. The Division had a long-standing practice of accepting such summaries when filed in support of refund claims. However, when the reliability of the computer summaries was raised, the Division sought to clear up an apparent discrepancy between the computer summaries and the actual invoices. The

weight of the evidence in this case favors a finding that the computer billing summaries were incorrect, reflecting more tax than actually billed to petitioners on their invoices. Marsha Eisner of the Division presented competent and credible testimony concerning her involvement in this matter, and of the contact she had with LILCO officials. Clearly, the explanation provided, describing how the computer billing summaries backed the tax amount out of the total invoice amount as a computer error, leads me to the conclusion that the computer summaries are not reliable. Likewise, the June 1, 1999 correspondence from LIPA confirmed that same fact, acknowledging that Westbury was exempt from the sales tax (a fact consistent with their invoices, but not their computer billing summaries). The Statement of Bills Rendered offers nothing further in petitioners' favor, inasmuch as the same information provided on the computer summaries appears on the statement. If such information is extracted from the same source, it too will reflect the error in tax calculation.

Lastly, petitioners argue that, with the exception of the tax, all items, including dollars, usage in kilowatts and therms and total payments, as stated on both the computer summaries and the invoices match. Thus, they contend that the computer summaries should be found to have the same reliability as the invoices as a means to substantiate payment of the tax. There is one variable from the usage formula used in calculating the total amount due that is missing from all the documents, i.e., cost per kilowatt or therm. With that item not stated, the computer error is a very plausible explanation of why the summaries could have been erroneously prepared by backing the tax out of the total. If the cost per unit had appeared, the error would have been more obvious, since the cost of usage, holding all other elements equal, would not have agreed on both documents. Although the result of this review of petitioners' refund claims appears to have an element of unfairness, the question that must be answered is whether petitioners actually made an

overpayment of tax. I believe the evidence supports that they were correctly billed and their invoices are the documents upon which the Division properly relied. Inasmuch as the Division is permitted to recover erroneous tax refunds where true facts later reveal such error (*Matter of Turner Construction v. State Tax Commission*, 57 AD2d 201, 394 NYS2d 78), the Division has properly issued notices of determination in this matter.

C. In addition to the tax assessed for return of the refunds, petitioners were also assessed penalties under Tax Law § 1145(a)(1)(i) in the amount of 30% of the refund amount for failure to properly pay over the tax which the Division imposed under Articles 28 and 29 of the Tax Law, plus interest. Tax Law § 1145(a)(1)(iii) provides that if the failure or delay was due to reasonable cause and not due to willful neglect, penalties may be abated. The petitions filed in this matter took exception to the penalties imposed, in addition to the Division's basis for claiming return of the funds. I believe petitioners have presented substantial facts which support a conclusion that there was clearly the absence of willful neglect to cause any delinquency in payment (20 NYCRR former 536.5[c][5]) and a reasonable reliance by petitioners on written information, i.e., the LILCO computer summaries, such that petitioners had no knowledge of circumstances which should have put them upon inquiry as to whether such information was erroneous. Petitioners in good faith filed for refunds of tax LILCO stated petitioners had paid. The Division accepted the documentation as presented, and had historically accepted the same or similar documentation in past years for claims of this nature. Only after much inquiry was it obvious that a discrepancy existed, leading to the conclusion that petitioners acted reasonably and in good faith in attempting to retain the refunds provided to them by the Division. Accordingly, the notices of determination which are the subject of this matter should be modified to reflect an abatement of penalties.

D. The petitions of Kensington Gate Owners Incorporated, Sunrise Point East Condominium, Topper Realty Corp., Westbury Terrace Condominium, White Oaks Nursing Home f/k/a Woodbury Health Related Facility, Willow House Owners Corp., and 30 Grace Avenue Apartments Corp. are hereby denied, except as granted by Conclusion of Law "C." The notices of determination dated March 20, 1998, May 11, 1998, May 22, 1998, June 8, 1998 and July 13, 1998 are upheld, as modified.

DATED: Troy, New York
August 16, 2001

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE